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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1959

No. 744

GEORGE OLSHAUSEN, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
*Petitioner.*

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No.

GEORGE OLSHAUSEN,
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COMMISSIONER OF INTERNAL REVENUE,
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## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals
## for the Ninth Circuit.

George Olshausen, petitioner on a petition in the United States Court of Appeals for the Ninth Circuit to review a decision of the Tax Court of the United States, petitions for a writ of certiorari to the said Court of Appeals, to review that part of the ruling of the Court of Appeals which affirmed the Tax Court's affirmance of penalties under Internal Revenue Code of 1939, sec. 294(d)(1)(A).

## OPINION OF LOWER COURTS.

The opinion of the Tax Court appears at R. 52-59. The opinion of the Court of Appeals is to be found at R. 75-9. They appear respectively as Appendices "A" and "B" to this petition. Tax Court opinion unreported, see 30 T.C.; Court of Appeals opinion reported 273 F. 2d 23.

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## JURISDICTIONAL STATEMENT.

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered and entered December 10, 1959, and appears as Appendix "C" to this petition. A timely application for Rehearing was filed, which the Court of Appeals denied on January 19, 1960. A copy of the order denying rehearing is attached as Appendix "D" to this petition. On January 22, 1960, the Hon. William E. Orr made an order staying the mandate of the Court of Appeals on condition that a Petition for Certiorari be on file on or before February 29, 1960.

The Supreme Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. 1254(1).

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## QUESTIONS PRESENTED FOR REVIEW.

The following questions are presented for review:

(1) Is the penalty imposed by 1939 Revenue Code sec. 294(d)(1)(A) within the protection of the Seventh Amendment guaranteeing a jury in civil actions at common law for amounts over $20 (or alternatively

of the Sixth Amendment, guaranteeing a jury in criminal cases)?

(2) May the penalty imposed by sec. 294(d)(1)(A) of the Revenue Code of 1939 be enforced by a deficiency notice, under the language of the sections defining a deficiency and defining the circumstances under which a deficiency notice may be issued (1939 Revenue Code secs. 271(a) and 272(a))?

(3) Is the reversed burden of proof of wiliful neglect imposed by the code section (1939 Code sec. 294(d)(1)(A)) and by Tax Court rule 32, unconstitutional as a deprivation of due process under the Fifth Amendment—

(a) On its face;

(b) On its face, coupled with the added element that penalties are imposed by the same officials who also have the duty of finding revenue, and that every financial penalty imposed serves this purpose;

(c) As applied, in view of the fact that all *taxes* were admittedly paid in full.

(4) May a finding of "wilful neglect" be sustained under said sec. 294(d)(1)(A) on the basis of reliance on an executive interpretation without check of the executive interpretation against the language of the statute?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

a. That part of the Fifth Amendement to the Constitution of the United States guaranteeing due process of law (quoted in Appendix "E");

b. The Sixth Amendment to the Constitution of the United States (quoted in Appendix "E");

c. The Seventh Amendment to the Constitution of the United States (quoted in Appendix "E");

d. Internal Revenue Code of 1939, sec. 271(a) (quoted in Appendix "E");

e. Internal Revenue Code of 1939 sec. 272(a) (quoted in Appendix "E");

f. Internal Revenue Code 1939, sec. 294(d)(1)(A) (quoted in Appendix "E");

g. Tax Court Rule 32 (quoted in Appendix "E").

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## STATEMENT OF THE CASE.

This is another case involving the construction and application of 1939 Internal Revenue Code sec. 294(d)(1)(A), one phase of which was before this Court in *C.I.R. v. Acker* (Nov. 16, 1959), ..... U.S. ....., 4 L.Ed. 2d 127. In that case the Court noted that "the question is still a live one" because of the large number of cases still pending undetermined under that section. (*C.I.R. v. Acker*, 361 U.S. 87, n. 3, 4 L.Ed. 2d 127, 130 n. 3.) The respondent sent out a deficiency notice for penalties under 1939 Code sec. 294(d)(1)(A) for

non-filing of estimated tax returns for the years 1952 and 1953. (R. 6-9.)

The pertinent sentences of Sec. 294(d)(1)(A) are the following:

> "In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. * * *"

Petitioner denied that the failure to file was due to "willful neglect" rather than "to reasonable cause". It was shown without contradiction that for eight years previous to 1952 petitioner had filed only forms 1044, without objection from the Commissioner, though petitioner's returns showed on their face that no estimated tax returns had been filed. (Findings of Tax Court, R. 53.) Previous to 1950 instructions pamphlets issued with Form 1040 did not state that both forms had to be filed; those issued for 1950 and after did so state but obscurely in a manner and place which made the innovation easy to overlook. (Exhibit 6, instructions pamphlets 1948-50 incl., introduced at R. 37.)

The Commissioner imposed, and the Tax Court affirmed, double penalties under both sec. 294(d)(1)(A) and 294(d)(2). The latter was stricken out by the

Court of Appeals on the authority of *C.I.R. v. Acker*, 361 U.S. 87, 4 L.Ed. 2d 127.

The present petition involves the penalties under sub-sec. (d)(1)(A).

Before the Tax Court petitioner raised the defense that the penalty under 1939 Code sec. 294(d)(1)(A) could not be enforced by deficiency notice, and that to do so was a deprivation of the right of trial by jury either under the Seventh or under the Sixth Amendment. (R. 14.) The parts of this defense pertaining to jury trial are quoted as Appendix "F" to this petition.

For the purposes of the record a jury trial was demanded in the Tax Court, and denied. (R. 16.)

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## JURISDICTION OF LOWER COURTS.

The Tax Court had jurisdiction under 26 U.S.C. 7451, 7453; the Court of Appeals had jurisdiction under 28 U.S.C. 7482, 7483.

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## REASONS FOR GRANTING WRIT OF CERTIORARI.

### 1. DENIAL OF JURY TRIAL IN VIOLATION OF VIITH AMENDMENT.

The Court of Appeals holds that a jury trial is unavailable to the taxpayer in a proceeding to enforce the penalty under 1939 Code 294(d)(1)(A). (The imposition of this section is a penalty—*C.I.R. v. Acker*, 361 U.S. 87, 4 L.Ed. 2d 127, 130, supra.)

a. The holding that a proceeding to enforce a civil penalty is not covered by the Seventh (or the Sixth) Amendment should be reviewed by the Supreme Court, because, as said in *Beacon Theatres v. Westover,* 359 U.S. 500, 501:

> "The Court of Appeals for the Ninth Circuit refused the writ, holding that the trial judge had acted within his proper discretion in denying petioner's request for a jury. 252 F. 2d 864. We granted certiorari, 356 U.S. 956, because 'maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.' Dimick v. Schiedt, 293 U.S. 474, 486."

b. There is a conflict among the Circuits as to whether the defendant in an action for a civil penalty is protected by the Seventh Amendment, and so entitled to a jury. While the Ninth Circuit has held that enforcement of a statutory *penalty* is not covered by the Seventh Amendment, the Eighth Circuit, in *Leimer v. Woods,* 196 F. 2d 828, 834, held to the contrary (civil penalty under rent control acts).

(1) In the present opinion, the Court of Appeals of the Ninth Circuit feels that permitting a jury on the enforcement of a *penalty* would necessarily permit a jury in the collection of a *tax:*

> (R. 79) "He contends that what we have here is an action of common law debt for which a jury trial was required. If this were true, all actions for the *collection of taxes* would be actions of

debt, as well as all other statutory proceedings involving a sum of money. Such a broad view of the common law action of debt is not tenable." (Italics added.)

On the other hand, the Eighth Circuit (in an action for a civil penalty under the Rent Control Acts) has taken the opposite view.

*Leimer v. Woods,* 196 F. 2d 828, 834:

"* * * the matter of recovery has been left by the general language of the statute within the traditional scope and nature of the common law action of debt and as such would conceptually fall within the jury trial guarantee of the Seventh Amendment of the Constitution. We so impliedly recognized and treated it in Shearer v. Porter, 8 Circ. 155 F. 2d 77. Action to recover liquidated damages granted by a statute, whether such damages are intended to be penal in nature or merely remedial, as here, have generally been recognized as constituting, in conceptual nature and legal attributes, common law actions of debt, except where the statute has given them some special and different form. Cf. 26 C.J.S. Debt Action of §2, page 16; United States v. Jepson, D.C.N.J., 90 F. Supp. 983, 984, 985; *Orne v. Roberts,* 51 N.H., 110, 115."

*Leimer v. Woods* is cited with approval in *Beacon Theatres v. Westover,* 359 U.S. 500, 511.

*Leimer v. Woods,* 196 F. 2d 828, 834, in turn cites and follows *U.S. v. Jepson,* 90 F.S. 983, 984, 985, which says:

(p. 984) "Long prior to our independence, there had grown up under original writs certain well-

defined actions at common law, among them, the action of debt, covering, among other causes, suits for statutory penalties and qui tam actions:"

(p. 985) "'* * * thus, in this case, though it be an action on the statute, it is an action of debt which is a common law action, and will be tried in a common law manner, * * *.'"

(p. 986) "It is my thought that when a federal statute embraces a common law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactment. It is by such methods that courts lose their power to enforce the Bill of Rights."

We submit that the Ninth Circuit's reasoning is unsound, because it disregards the well-established distinction between a penalty and a tax. *C.I.R. v. Acker*, 4 L. Ed. 2d 127 makes the distinction, holding that the "additions" under 1939 Code sec. 294(d)(1)(A) are a *penalty*. In *Leimer v. Woods*, 196 F. 2d 828, enforcement of a *penalty* is held to be subject to the guarantees of jury trial. On the other hand, collection of a *tax* is not subject to any constitutional right of trial by jury. *(Wickwire v. Reinecke*, 275 U.S. 101.) Since the distinction between a *tax* and a *penalty* exists, holdings as to one do not affect the other.

(2)(a) There is a similar conflict between the Ninth and Eighth Circuits as to what, if anything, will remove enforcement of a money claim from the pro-

tection of the Seventh Amendment. The Ninth Circuit says of decisions of the Supreme Court (discussed below):

> (R. 79) "This is an *express requirement* that an action to recover a penalty be prosecuted as a common law action of debt. The dicta in those cases, therefore, do not stand for the broad position, urged by petitioner, that statutory penalties are always recovered in common law actions of debt." (Italics added.)

This implies that an action to enforce a penalty is covered by the Seventh Amendment only if it is *expressly* made a common law action of debt.

On the other hand, the Eighth Circuit holds, in the language quoted supra from *Leimer v. Woods*, 196 F. 2d 828, 834, that actions to enforce a statutory penalty are actions of debt within the Seventh Amendment, "*except where the statute has given them some special or different form.*"

In other words, the Eighth Circuit holds an action to enforce a penalty to be a common law action for debt except when specifically made otherwise; the Ninth Circuit holds it an action of debt only when expressly made so.

(b) Apart from this, we submit that if a proceeding to enforce a civil penalty is within the Seventh Amendment, it cannot be withdrawn by the simple device either of not providing for procedure, or of providing that there shall be no procedure. If a remedy or a penalty is within the Seventh Amendment, the jury trial cannot be denied merely by stripping

away other procedure. To do so would be to sacrifice substance to form.

(c) The Ninth Circuit confuses the issues when it says:

> (R. 79) "We have under consideration in the instant case a proceeding provided by statute to *test the validity of a penalty assessed* pursuant to that statute. No such action existed at common law, and, therefore, no jury trial is required by the Seventh Amendment." (Italics added.)

The question is not as to the action to *test the validity* of the assessment but whether the *assessment itself* may be imposed without a jury trial (i.e., by deficiency notice, and solely by an executive officer). This was the issue raised in the Tax Court: see Appendix "F". As we show below, as an independent ground of certiorari, the statute does not even clearly provide for imposing the penalty without judicial procedure. The question is especially acute in relation to the penalty under 294(d)(1)(A) which is not automatic, but depends on "willful neglect" vs. "reasonable cause".

(d) For the same reason, the issues mentioned above are not changed by the Court of Appeals' suggestion at R. 78 that

> "Having taken advantage of the deficiency notice procedure by filing a petition in the Tax Court without paying the tax first, petitioner now makes the claim that he was deprived of a jury trial. Such deprivation was due to his own act. If he desired a jury trial, he should have paid the tax first and then sued for a refund in the district court. There is no right to a jury trial without

paying first as a statutory matter. (Flora v. U.S. 375 (sic) U.S. 63 (1958)) and no right to a jury trial at all in tax matters as a constitutional requirement. (Wilshire (sic) v. Reinecke, 275 U.S. 101 (1929)).”

This quotation first slides over the distinction between a tax and a penalty. After the commissioner had filed a deficiency notice there was no remedy except either to go to the Tax Court, or pay the disputed penalty in full as a precondition to a jury trial.

But if the right of trial by jury existed under the Seventh Amendment, it could not be made conditional upon the payment in full (or even in part) of the disputed amount of a disputed penalty. The right of trial by jury guaranteed by the Seventh Amendment is the right substantially as it existed at common law, *Root v. L.S. & M.R.S. Co.*, 105 U.S. 189, 206:

> “* * * the 7th Amendment forbids any infringement of the right of trial by jury, as fixed by the common law.”

*Town of Grand Chute v. Winegar*, 82 U.S. 373, 375:

> “The right to trial by jury is a great constitutional right, and it is only in exceptional cases and for specified causes that a party may be deprived of it.”
>
> *McKeon v. Central Stamping Co.*, 264 F. 385, 387 (CCA 3).

We have found no case, and the Government has cited none, in which the right of trial by jury at common law was ever made conditional upon the prepay-

ment of a penalty disputed both as to liability and amount. To make a jury trial on a *penalty* depend upon prepayment, would be to subject the right to an unconstitutional burden.

The Court of Appeals cites *Flora v. U.S.*, 357 U.S. 63, without noting that a rehearing was granted in that case, although this was called to its attention in the Petition for Rehearing in the present case.

28 U.S.C. 1346 (a)(1) is one of the statutes fixing the jurisdiction of the federal courts. It does not provide that its procedures shall be exclusive. While it authorizes suits for recovery, both of taxes and penalties, the history of the two is quite different. Taxes had been collected by the executive, and suits to recover illegally paid taxes were something new. *Cheatam v. U.S.* (1876), 92 U.S. 85. On the other hand penalties similar to that under 1939 Code sec. 294(d)(1)(A) were enforced judicially before a jury. *Felton v. U.S.* (1878), 96 U.S. 699.

C. (1) Certiorari should be granted for the further purpose of reconciling conflicting *dicta* of the Supreme Court.

While *Helvering v. Mitchell*, 303 U.S. 396, 402-7, has a dictum that penalties may be enforced administratively, *U.S. v. Regan*, 232 U.S. 37, 44, and *Hepner v. U.S.*, 213 U.S. 103, 115, both say that the defendant is entitled to a jury trial when the government moves to enforce a civil penalty.

The two other cases which the Court of Appeals cites on administrative penalties rest on a special principle, not applicable to internal revenue.

*Oceanic Nav. Co. v. Stranahan,* 214 U.S. 320 (R. 78) arose from a penalty for the illegal importation of aliens. The right to impose such a penalty administratively was expressly based on the sovereign's right to stop persons and things at its borders. (214 U.S. 320, 334-5.)

*Passavant v. U.S.,* 148 U.S. 214, a customs case, does not expressly mention the sovereign's right to stop people or goods from crossing its boundaries, but later cases put customs and immigration on the same ground. *Oceanic Nav. Co. v. Stranahan,* 214 U.S. 320, 334-5, loc. cit. supra, quoting from *Buttfield v. Stranahan,* 192 U.S. 476, 492-3. This is also the logic of the situation. Besides, *Passavant v. U.S.* was decided partly on the ground that the added duty was "a matter of mere computation"—something not true of the present issue of "reasonable cause" vs. "wilful neglect".

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**2. THE COURT OF APPEALS GOES CONTRARY TO THE LANGUAGE OF CONGRESS AND THE OPINION IN C.I.R. v. ACKER, 361 U.S. 87, 4 L.Ed. 2d 127, IN HOLDING PENALTIES UNDER 1939 SEC. 294(d)(1)(A) TO BE WITHIN THE DEFICIENCY NOTICE STATUTES.**

In *C.I.R. v. Acker,* 361 U.S. 87, 4 L.Ed. 2d 127, this Court distinguished between a tax and a penalty, holding that the "addition" under 1939 Code 294 (d)(1)(A) was a penalty.

(a) In view of this holding the enforcement of the "addition" under sec. 294(d)(1)(A) is clearly not within the language of the deficiency notice provisions.

1939 Code sec. 271(a)(1) and 272(a) define a deficiency and set forth the circumstances under which a deficiency notice may be issued. Both sections say unequivocally that there must be a deficiency in the *tax*. (See Appendix "E" to this petition.) Enforcement of the *penalty* under sec. 294(d)(1)(A) is left to an action at common law under 1939 Code secs. 3740-45; 1954 Code sec. 7401; and as it was in the act applied in *Felton v. U.S.*, 96 U.S. 699. This construction not only follows the literal wording of 1939 Code secs. 271(a)(1) and 272(a) but also avoids the constitutional problems of denial of jury trial just discussed. It is the construction to be adopted, under the rule of *Ullmann v. U.S.*, 350 U.S. 422, 433, that the literal meaning of a statute must be adopted where it is also the meaning which avoids constitutional difficulties. To the same effect, *Guessefeldt v. McGrath*, 342 U.S. 308, 317-18.

The cases cited by the Court of Appeals are all prior to the decision in *C.I.R. v. Acker*, 4 L.Ed. 2d 127. They overlook the procedure by common-law action, so far as they hold that enforcing a *penalty* by a deficiency notice accords the taxpayer a "right".

All of them confuse a penalty with a tax, and in that way are contrary to *C.I.R. v. Acker*, 4 L.Ed. 2d 127.

In *Davis v. Dudley*, 124 F.S. 426, the taxpayer brought an action to restrain the enforcement of penalties under 1939 Code 294(d) *without any procedure at all*—arguing that he was entitled to deficiency notice procedure. The injunction was granted. This was however done upon the following reasoning, which, we

submit, is squarely contrary to the distinction drawn in *C.I.R. v. Acker,* 4 L.Ed. 2d 127, 130, and n. 4:

> (p. 428) "However, since each subdivision provides that the penalty is to 'be added to the tax', each penalty 'can then be said to become part of the tax': Newsom v. C.I.R., 22 T.C. 225. As a part of the tax, the unpaid total amount of the penalties imposed by these subdivisions is, we think, a deficiency within the meaning of §271(a) because it comprises 'the amount determined by the Commissioner to be the correct amount of the tax due by the taxpayer over the amount of the tax reported by him', plus amounts assessed or collected without assessment."

But *C.I.R. v. Acker* holds that the "addition" under 1939 Code sec. 294(d)(1)(A) is a penalty and *remains a penalty throughout*—it does not "become a part of the tax".

Consequently the authority on which the Court of Appeals relies is contrary to *C.I.R. v. Acker,* 4 L.Ed. 2d 127.

Since *Davis v. Dudley,* 124 F.S. 426, quotes *Newsom v. C.I.R.,* 22 T.C. 225, the foregoing discussion disposes of that case, also cited by the Court of Appeals.

*Myers v. C.I.R.,* 28 T.C. 12, made exactly the same holding, which now appears contrary to that of *C.I.R. v. Acker,* supra. The *Myers* opinion says:

> (p. 13) "The real question for each year is whether the additions to the tax under section 294(d) are to be considered *a part of the tax* for the purposes of section 271(a), which defines a deficiency for present purposes, as the amount by

which the *tax* imposed by chapter 1 exceeds the amount shown as the tax by the taxpayers upon their return."

(p. 14) "Those additions are *part of the whole tax* imposed by chapter 1 and must be considered along with the so-called overassessment of the subchapter B tax for that year to find out whether the Commissioner actually determined a deficiency for the year within the definition of section 271 or whether he determined an overassessment." (Italics added.)

All this is, of course, directly contrary to the holding of *C.I.R. v. Acker*, 4 L.Ed. 2d 127, that the "additions" under 1939 sec. 294(d)(1)(A) are a *penalty*, and *not* a tax.

Besides, it should be noted that when Congress intended an "addition" to be considered "part of the tax" it said so expressly. *Ely v. Walker Dry Goods Co. v. U.S.*, 34 F. 2d 429, 430; *Schneider v. U.S.*, 119 F. 2d 215, 217 (arising respectively under the taxing acts of 1918 and 1921); both cited in *Myers v. C.I.R.*, 28 T.C. 12, 14; so 1939 Code sec. 294 itself provides in subsection (a)(1) that the 6% interest for delayed payments shall be *"part of the tax"*. No such provision is contained in subsection (d)(1)(A).

**3. REVERSED BURDEN OF PROOF VIOLATES DUE PROCESS CLAUSE OF VTH AMENDMENT (a) GENERALLY AND (b) AS APPLIED.**

**a. Reversed Burden of Proof Unconstitutional Generally.**

Throwing the burden of proof on the defendant is a deprivation of due process unless there is a rational connection between the facts proved and the presumption which is claimed to follow. (*Western & A. Ry. v. Henderson*, 279 U.S. 639; *Tot v. U.S.*, 319 U.S. 463; *Manley v. Georgia*, 279 U.S. 1; *Morrison v. California*, 291 U.S. 82.)

(1) 1939 Code sec. 294(d)(1)(A) imposes the penalty "unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect." Tax Court Rule 32 (Appendix "E") provides that "the burden of proof shall be on the petitioner".

The Court of Appeals holds that the statute is the source of the reversed presumption (R. 80) but whichever is the source, the problem is the same.

The Court of Appeals holds that:

> (R. 80) "Where one fact (willful neglect) is a logical conclusion from another (failure to file), there is no constitutional infirmity in presuming the second fact from the first, thus putting the burden of proof on the protestant."

The provisions of the present statute, presuming willful neglect are essentially the same as those presuming negligence, held unconstitutional in *W & A Ry v. Henderson*, 279 U.S. 639, supra.

(2) In the present proceeding it has always been admitted that the *taxes* were paid in full (R. 7, 8): "Net income as shown on return—unchanged. Tax liability as shown on the return Account No. A.P. 5310 [O.P. 35226] San Francisco District—Unchanged—Deficiency (Overassessment) in income tax—None)".

Under the definitions of "willful neglect" (cited below) this is the basis for the point that the reversed presumption is not only unconstitutional generally but unconstitutional as applied.

(3) In this case the basic unfairness which makes for the unconstitutionality of the reverse presumption on a penalty, is aggravated by the fact that the Commissioner, who has to make the preliminary finding of fault is the same official who has the obligation of finding and collecting revenue (1939 Code sec. 3600; 1954 Code 7601). *Every finding of a violation will increase the revenue.*

Many jurisdictions have held that such duality violates basic principles of fairness, and with them due process of law. This Court has not yet decided the question. It *was raised* but not decided in *Tumey v. Ohio,* 273 U.S. 510. See argument of counsel, 273 U.S. 510, 512-13, citing the following cases:

*Day v. Savadge* (1724), Hobart 85, 87, 80 Eng. Rep. R. 235, 236;

*City of London v. Wood* (1703), 12 Mod. 669, 687, 88 Eng. Rep. R. 1592, 1602;

*Landfear v. New Orleans* (1832), 4 La. 97, 23 Am. Dec. 477;

*Pearce v. Atwood* (1816), 13 Mass. 324, 340-41;

*Gregory v. Cleveland C. & C.R. Co.* (1854), 4 Ohio St. 675, 677;

*State ex rel. Colcord v. Young* (1893), 31 Fla. 594, 19 L.R.A. 636, 34 Am. St. R. 41, 12 So. 673, 676-7;

*Nettleton's Appeal* (1859), 28 Conn. 268, 271;

*Dimes v. Grand Junction Canal* (1852), 3 H.L. Cas. 759, 789, 10 Eng. Rep. R. 301, 313;

*Moses v. Julian* (1863), 45 N.H. 52, 59, 84 Am. Dec. 114;

*Stockwell v. White Lake* (1871), 22 Mich. 341, 346;

*State, Winans Pros. v. Crane* (1873), 36 N.J.L., 394, 397;

*Stuart v. Com.* (1895), 91 Va. 152, 21 S.E. 246, 247;

*Findley v. Smith* (1896), 42 W. Va. 299, 26 S.E. 370, 372;

*Ex parte Cornwell* (1905), 144 Ala. 471, 39 So. 354;

*Yazoo & M. Valley R. Co. v. Kirk* (1912), 102 Miss. 41, 42 L.N.S. 1172, 58 So. 710, 711, 834; Ann. Cas. 1914C 968;

*Barnard v. Bd Education* (1898), 19 Wash. 8, 40 L.R.A. 317, 67 Am. St. R. 706, 52 P. 317, 320.

Typical of the position taken by these cases, is the opinion of Chief Justice Holt in *City of London v. Wood* (1703), 12 Mod. 669, 88 Eng. Rep. R. 1592—the earliest case. That was an action on a bond in favor of the City of London, brought in the Mayor's Court.

Chief Justice Holt held the Mayor's Court incompetent to try the case. He added that any statute attempting to authorize it would be void. (p. 687; p. 1602):

> "But the true great point is, that the Court is held before the mayor and aldermen, and the action brought in the names of the mayor and commonalty; and that very man, who is head of the city, and without whom the city has no ability or capacity to sue, is the very person before whom the action is brought; and this cannot be by the rules of any law whatever, for it is against all laws that the same person should be party and judge in the same cause, for it is manifest contradiction, for the party is he that is to complain to the judge, and the judge is to hear the party, the party endeavors to have his will, the judge determines against the will of the party, and his authority to force him to obey his sentence, and can any man act against his own will and force himself to obey? * * * And what my Lord Coke says in *Dr. Bonham's case* in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an act of Parliament should ordain that the same person should be party and judge, or which is the same thing, Judge in his own case, it would be a void Act of Parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong though it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature; but it cannot make one that lives under a government Judge and party."

*In the present case the problem of an interested official complicates the basic problem of a presumption of guilt. The Collector makes a finding of fault which increases the revenue, and then claims to enter the Tax Court with a presumption in favor of his decision.*

**b. Reversed Burden of Proof Unconstitutional as Applied.**

Apart from the foregoing, the reversed presumption (i.e. presumption of willful neglect) is unconstitutional as applied in view of the fact that *taxes were admittedly paid in full.* (This point was made in the Petition for Rehearing.) The Court of Appeals bases its decision on the theory that "willful neglect" is a logical inference from the fact of non-filing. (The Commissioner has taken the position that the phrase "due to reasonable cause and not to willful neglect" means that the statute undertakes to penalize willful neglect. See *Patchen v. C.I.R.,* 258 F. 2d 544, 552.)

The point that the presumption of willful neglect is unconstitutional as applied, depends *first,* on the definition of willful neglect, and *second,* on whether willful neglect as defined is a reasonable inference where taxes have been paid in full.

Willful neglect or omission is defined in *Felton v. U.S.,* 96 U.S. 699, 702, to require a "bad purpose". This was a tax case. It is the first of a series of cases each of which has been cited with approval. *Felton v. U.S.,* 96 U.S. 699, is cited in *Murdock v. U.S.,* 290 U.S. 389, 394, another tax case, which in turn is cited with approval in *Heikinnen v. U.S.,* 355 U.S. 273, 279. The *Heikinnen* case defines "willful failure" as " 'bad purpose' or '(non-)' justifiable excuse; or the like".

The "bad purpose" in failing to comply with any tax law would obviously be to evade taxes. But *when taxes have been paid in full* this "bad purpose" obviously falls away. None other is suggested.

It is submitted that where taxes have been paid in full throughout, there is no rational basis for inferring a "bad purpose" from the non-filing of an estimated tax return. This being so, the presumption of willful neglect is unconstitutional as applied under the authorities cited, supra.

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**4. COURT OF APPEALS GOES CONTRARY TO FELTON v. U. S., 96 U.S. 699, AND RELATED CASES, IN HOLDING "WILLFUL NEGLECT" SUSTAINED BY ACCEPTANCE OF EXECUTIVE INTERPRETATION.**

The meaning of "willful neglect" has already been discussed: *Felton v. U.S.*, 96 U.S. 699, states that it requires a bad purpose.

The Court of Appeals' rejection of the claim of laches leads it to a holding on the sufficiency of evidence which is contrary to *Felton v. U.S.*, 96 U.S. 699, and *Heikinnen v. U.S.*, 355 U.S. 273.

It is held that instructions pamphlets which the Commissioner has destroyed are immaterial because, supposedly there is sufficient evidence with or without them. The Court of Appeals holds that "willful neglect" is sufficiently shown by the acceptance of an executive interpretation of a statute without making an independent check of the language of the statute.

The Court of Appeals says:

> (R. 80) "The claim of laches made here is based on the ground that the government destroyed forms and accompanying instruction booklets for years preceding 1950; that such pamphlets if available would have shown that there was no express instruction in them with regard to the filing of declarations of estimated tax as has been contained in such pamphlets since 1950; and that he was therefore, justified in believing that he was not required to file declarations in 1952 and 1953. If it be granted that the production of these pamphlets would show what is claimed for them, the absence of express instructions on the point would not excuse ignorance of the unambiguous requirement contained in §58 of the Internal Revenue Code of 1939."

"Willful Neglect" is here held to be shown by the acceptance of the executive interpretation (the instruction pamphlets accompanying Form 1040) without checking the statute to find whether the executive interpretation was sound or not. (No point is made of the two-year gap, 1950-52, which was briefed and is not now treated as an issue.) Whatever else may be said about unquestioning acceptance of an executive interpretation, we submit it does not, even in a lawyer, show any "bad purpose". The holding in this part of the opinion, that acceptance of an executive interpretation without checking it against the statute, constitutes "willful neglect", is contrary to *Felton v. U.S.*, 96 U.S. 699, and *Heikinnen v. U.S.*, 355 U.S. 273.

## CONCLUSION.

It is respectfully submitted that a writ of certiorari should be granted, and the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Dated, San Francisco, California,
February 25, 1960.

Respectfully submitted,
GEORGE OLSHAUSEN,
*Petitioner.*

(Appendices "A", "B", "C", "D", "E" and "F" Follow.)

## Appendix "A"

T. C. Memo. 1958-85

Tax Court of the United States

George Olshausen, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 61127. Filed May 13, 1958.

George Olshausen, pro se.

Leslie T. Jones, Jr., Esq., and T. M. Mather, Esq., for the respondent.

## MEMORANDUM FINDINGS OF FACT AND OPINION

This proceeding involves a deficiency in additions to the tax under section 294 of the Internal Revenue Code of 1939 for each of the years 1952 and 1953, as follows:

| | | Additions to the tax under— | |
|---|---|---|---|
| Year | Deficiency | Sec. 294(d)(1)(A) | Sec. 294(d)(2) |
| 1952 | — | $734.84 | $489.92 |
| 1953 | — | 114.73 | 76.50 |

The issues are: (1) Whether the respondent may proceed by notice of deficiency where the determination involves only additions to the tax; (2) whether such proceeding violates the Fifth and Seventh Amendments to the Constitution; (3) whether the respondent is barred by laches; (4) whether the respondent erred in determining that the failure to file a declaration of estimated tax was not due to reasonable cause; and, (5) whether the respondent properly determined additions to the tax for substantial understatement of estimated tax.

## Findings of Fact

Some facts have been stipulated and are found accordingly.

Petitioner is an individual residing at 1238 Pacific Avenue, San Francisco, California. His returns for the taxable years involved were filed with the director of internal revenue for the district of San Francisco, California.

Petitioner is an attorney and has practiced in the Courts of California since 1926.

During the taxable years in question the petitioner did not file a declaration of estimated tax.

Petitioner filed a declaration of estimated tax in either 1943 or 1944. Under the belief the law had been changed, petitioner filed no declaration during the period 1945 to 1953, inclusive.

On January 15th of each year, petitioner regularly filed Form 1040 and paid the tax shown to be due. Petitioner stated he was under the impression that the filing of a declaration of estimated tax was optional if Form 1040 was filed on January 15th. Petitioner was unable to recall how he gained the impression a declaration was unnecessary. Petitioner made no investigation of the law.

During the period 1945 to 1953, inclusive, the returns filed on Form 1040 by the petitioner disclosed his failure to file the declaration of estimated tax.

During the period between 1944 and 1953, petitioner received a refund and was billed for additional amounts due. During such period petitioner was not

contacted by the Internal Revenue Service and believes the adjustments referred to were mathematical.

In each of the years 1946 and 1950, petitioner reported income apportioned under section 107 of the 1939 Code. Petitioner was unable to recall how he found out how to use and compute his income under section 107, but thought he got such information from conversations with other attorneys who were familiar with such section.

In preparing his returns on Form 1040, petitioner used the instruction pamphlet, which usually accompanied the form, as a reference book where a reference to the instructions appeared on the face of Form 1040.

On March 13, 1950, the Commissioner of Internal Revenue issued a press release pertaining to section 294 of the Code. Petitioner was unaware of such release until it was called to his attention at a conference of revenue agents which occurred in the fall of 1955.

In the deficiency notice, the respondent made the following explanation:

You did not file Declarations of Estimated tax nor make timely payments of estimated tax for the taxable years 1952 and 1953. No reasonable cause having been shown, you are liable for the additions to the tax provided by section 294(d)(1)(A) and section 294(d)(2), Internal Revenue Code (1939) for the taxable years 1952 and 1953.

Petitioner's failure to file declarations of estimated tax for the taxable years 1952 and 1953 was not due to reasonable cause.

## Opinion

LeMire, Judge: The respondent determined additions to the tax under section 294 of the Internal Revenue Code of 1939 against petitioner for each of the taxable years 1952 and 1953.

The amounts of the additions to the tax determined by the respondent are not in dispute. Petitioner makes no claim that he filed a declaration of estimated tax in the taxable years involved.

Petitioner is a lawyer appearing pro se. His primary contention is that the respondent is not authorized to proceed by notice of deficiency where only additions to the tax are determined, and the notice here in question is not a notice of deficiency within the definition of section 271 of the Code. We find no merit in such contention. It is well settled that a notice involving merely additions to the tax under section 294 is a deficiency notice under section 271, and that the filing of a petition with this Court confers jurisdiction. Herbert Eck, 16 T.C. 511, affd. 202 F. 2d 750, certiorari denied 346 U.S. 822; E. C. Newsom, 22 T.C. 225, affd. per curiam 219 F. 2d 444; Union Telephone Co., 41 B.T.A. 152; Ely & Walker Dry-Goods Co. v. United States, 34 F. 2d 429; certiorari denied 281 U.S. 755; Charles E. Myers, Sr., 28 T.C. 12.

The petitioner further argues that to uphold the respondent's right to proceed by deficiency notice deprives him of the right to a jury trial under the Seventh Amendment, and violates the due process clause under the Fifth Amendment to the Constitution.

The constitutionality of sections 58 and 294 here involved has recently been considered and upheld. Erwin v. Granquist, F. 2d Feb. 13, 1958) certiorari applied for. The Seventh Amendment, relating to a jury trial, applies only to actions at law and not to statutory proceedings. Wickwire v. Reinecke, 275 U.S. 101. Petitioner could pay the tax, sue for a refund, and thus have a jury trial. We find no merit in either of petitioner's contentions. The defense of laches is equally without merit. The Supreme Court in a number of cases has held that the United States is not subject to the defense of laches, if any here exist. United States v. Summerlin, 310 U.S. 414, 416 (citing authorities).

The issue whether the petitioner's failure to meet the requirements of section 58 was due to reasonable cause and not to wilful neglect presents a factual question to be resolved upon the merits.

Section 294(d)(1)(A) imposes the duty upon the Commissioner to determine, in the first instance, whether or not the failure to file a declaration of estimated tax is due to reasonable cause. Such a determination was made and is prima facie correct. The burden is upon the petitioner to establish that the failure was due to reasonable cause. Wickwire v. Reinecke, supra; Welch v. Helvering, 290 U.S. 111.

Reasonable cause is defined as the "exercise of ordinary business care and prudence." In re Fisk's Estate, 203 F. 2d 358. Petitioner contends that the evidence in the instant case brings him within that definition.

As justification for his failure to file the declarations, petitioner contends that no one connected with the revenue service ever called his attention to the necessity of filing declarations, although his regular returns filed on Form 1040 clearly disclose that he had not filed any declarations. Ignorance of the law is no excuse. The record, however, shows that petitioner was familiar with the requirements of the law since in either 1943 or 1944 he did file such a declaration.

Petitioner testified that he gained the impression that there had been a change in the policy of the Internal Revenue Service not to require a declaration where Form 1040 was filed by January 15th. Petitioner could not recall where he gained such impression.

As an additional excuse, petitioner testified that Form 1040 made no reference to the necessity to file a declaration and since the questions pertaining to withholding on Form 1040 were not changed over the years, he did not examine the instruction pamphlet.

Petitioner could not rely upon the failure of the revenue service to call his omission to his attention. This record persuades us that petitioner did not use reasonable diligence in ascertaining his duty to comply with the law. Any reasonable and prudent person would not rely upon an impression, but would consult the current law. Neither indifference nor reliance upon rumor constitute reasonable cause. Howard M. Fischer, 25 T.C. 102; Harold C. Marbut, 28

T.C. 687; Charles M. Kilborn, 29 T.C. 102 (on appeal C.A.-5).

Upon the entire record we are of the opinion that petitioner has not carried the burden of showing that his failure to file declarations of estimated tax in the taxable years 1952 and 1953 was due to reasonable cause and we have so found as a fact.

Finally, petitioner contends that since he filed no declarations of estimated tax, the additions to the tax under section 294(d)(2) cannot be sustained. A number of District Court decisions support the petitioner.[1]

This Court has consistently held that the additions to the tax under sections 294(d)(1)(A) and 294(d)(2) are cumulative. G. E. Fuller, 20 T.C. 308; H. R. Smith, 20 T.C. 663; Harry Hartley, 23 T.C. 353; Clark v. Commissioner, ..... F. 2d ..... (Mar. 13, 1958) affirming a memorandum opinion of this Court. See also, Peterson v. United States, 141 F. Supp. 382; Furrow v. United States, 150 F. Supp. 581; Palmisano v. United States, 159 F. Supp. 98.

The respondent's determination as to the additions to the tax under sections 294(d)(1)(A) and 294(d)(2) for each of the taxable years 1952 and 1953 is sustained.

Decision will be entered for the respondent.

Served May 13, 1958.

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[1] United States v. Ridley, 120 F. Supp. 530; Jones v. Wood, 151 F. Supp. 678; Owens v. United States, 134 F. Supp. 31; Powell v. Granquist, 146 F. Supp. 308; Stengle v. United States, 150 F. Supp. 364; Barnwell v. United States, ..... F. Supp. ..... (Feb. 4, 1958).

The Tax Court of the United States
Washington

Docket No. 61127

GEORGE OLSHAUSEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

## DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed May 13, 1958, it is

Ordered and Decided: That there are additions to the tax under sections 294(d)(1)(A) and 294 (d)(2), for the years 1952 and 1953, as follows:

| | Additions to the tax under | |
|---|---|---|
| Year | Sec. 294(d)(1)(A) | Sec. 294(d)(2) |
| 1952 | $734.84 | $489.92 |
| 1953 | 114.73 | 76.50 |

Entered May 15, 1958.

[Seal] /s/ C. P. LeMIRE,
Judge.

Served May 16, 1958.

## Appendix "B"

### United States Court of Appeals for the Ninth Circuit

| | |
|---|---|
| GEORGE OLSHAUSEN, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.* | No. 16,183 Dec. 10, 1959 |

**Petition to Review a Decision of the Tax Court of the United States.**

Before: HEALY, ORR and HAMLIN, Circuit Judges.

ORR, Circuit Judge:

For failure to file declarations of estimated tax for the years 1952 and 1953, the Commissioner of Internal Revenue pursuant to §294 of the Internal Revenue Code of 1939 assessed additions to petitioner's tax as penalties for said failure[1] and also for substantial

[1] §294(d)(1)(A): "Failure to File Declaration. In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid . . ."

underestimate of estimated tax.[2] The Tax Court sustained the findings of the Commissioner and taxpayer petitions for review.

At the time of argument and submission of the case, there was pending for hearing before the Supreme Court of the United States the case of Commissioner v. Acker, ..... U.S. ..... (1959), in which the question of whether sections 294(d)(1)(A) and 294(d)(2) provided cumulative penalties for failing to file was under consideration. The Tax Court had held in the instant case that the Commissioner was correct in assessing two penalties for the reason that petitioner's failure to file a declaration amounted to an estimation of zero tax and, therefore, was a substantial underestimate. Petitioner challenges this holding. We have withheld our opinion pending a determination of the question by the Supreme Court. A decision in the Acker case was recently rendered wherein it was held that the two sections were not cumulative; that section 294(d)(2) has no application in the case of a failure to file a declaration of estimated tax. The decision as we read it settles another controversy existing between the Commissioner and the petitioner, to wit, that the addition to the tax as provided in section 294(d)(1)(A) is a penalty.

While the case of Commissioner v. Acker resolves the cumulative penalty issue in favor of petitioner, he

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[2] §294(d)(2): Substantial Underestimate of Estimated Tax. If 80 per centum of the tax . . . exceeds the estimated tax . . . there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser . . ."

presents other claimed errors which require disposition:

Petitioner argues that the deficiency notice procedure set up in the Code (§272 I.R.C. 1939) cannot be used in enforcing the additions to the tax under §294 where there is no deficiency in the tax apart from the additions. The following cases are opposed to petitioner's contention: Davis v. Dudley, 124 F. Supp. 426 (W.D. Pa. 1954); Myers v. C.I.R., 28 T.C. 12 (1957); Newsom v. C.I.R., 22 T.C. 225 (1954), aff'd per curiam, 219 F.2d 444 (5th Cir. 1955).[3] Be-

[3]These cases hold the additions imposed by §294 to be deficiencies within the meaning of §271 I.R.C. 1939 which defines "deficiency" as follows: ". . . 'deficiency' means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made."

The deficiency notice in the present case was sent in 1955. §7851 (6) I.R.C. 1954 directs that after January 1, 1955 chapters 63-65 I.R.C. 1954, relating to assessment, collection and refund of taxes, shall apply to taxes imposed by the 1939 Code. §6211, defining "deficiency" in the 1954 Code, is in chapter 63. It defines "deficiency" by referring to the amounts imposed by subtitles A and B. This engenders confusion since §294, which was in subtitle A in the 1939 Code, is in subtitle F in the 1954 Code as §6654 and the additions imposed by the latter section are not within the definition of "deficiency" in the 1954 Code (but are treated as deficiencies for purposes of collection by virtue of §6659 which, being in chapter 68, does not apply to taxes imposed by the 1939 Code). As a tax imposed by the 1939 Code, §294 additions would be within the "deficiency" definition of the 1954 Code if §6211 is read as referring to subtitle A in the 1939 Code when that Code is involved, but such a contention is doubtful since a statute in referring to subtitles should be read as referring to subtitles in the statute the reference appears in. (Some support for reading it as a reference to the 1939 Code is found in §7851(7)(c), but problems of construction would still remain.)

fore the creation of the Tax Court (originally the Board of Tax Appeals), the rule was "pay first and litigate later." The deficiency notice procedure now provides taxpayers with the alternative of petitioning the Tax Court within 90 days after the deficiency notice is issued and being able to contest the assessment before that court without having to pay the assessment first. §272 I.R.C. 1939. This was intended to benefit taxpayers. 65 Cong. Rec. 2429. We are impressed by the reasoning employed in Davis v. Dudley, supra: ". . . [T]he imposition of the delinquency penalties in subdivisions 294(d)(1)(A) and (B) depends exclusively upon the judgment of the Commissioner. Hence, in the absence of unequivocal language to the contrary, . . . we think that this type of penalty should be construed as a deficiency in order that the judgment of the Commissioner may be tested by the Tax Court as a safeguard against erroneous assessments and compulsory payment pending final decision." (At p. 428). This court in Granquist v. Hackleman, supra, cited the above mentioned cases with approval ". . . to illustrate a recognition in the courts of the underlying reasons in favor of affording a taxpayer a prepayment review in the Tax Court. . . . Where the statute does not specifically, by its pre-

We arrive at the same result by a slightly different path. Since the definition of "deficiency" contained in §6211 of the 1954 Code cannot accurately be applied to the 1939 Code as regards the additions imposed by §294 because of the rearrangement of the content of the subtitles, we construe the mandate in §7851(6)(B) I.R.C. 1954 as directing that the 1954 Code govern only when capable of application, and since §6211 is not so capable in this case, we revert to the definition contained in the 1939 Code of "deficiency" and the cases cited above interpreting it.

cise language, take away this right, . . . we believe that the taxpayer should be afforded an opportunity to file suit in the Tax Court to determine his liability. The requirement of a 90 day deficiency notice affords this right to the taxpayer." (At p. 15)

Petitioner urges, however, that we construe the statute as not affording taxpayers this right in order to avoid alleged "serious constitutional questions." Having taken advantage of the deficiency notice procedure by filing a petition in the Tax Court without paying the tax first, petitioner now makes the claim that he was deprived thereby of a jury trial. Such deprivation was due to his own act. If he desired a jury trial, he should have paid the tax first and then sued for a refund in the district court. There is no right to a jury trial without paying first as a statutory matter (Flora v. U.S., 375 U.S. 63 (1958) and no right to a jury trial at all in tax matters as a constitutional requirement (Wilshire v. Reinecke, 275 U.S. 101 (1929)). The Sixth Amendment to the Constitution applies only to criminal proceedings. Even though §294(d)(1)(A) imposes a penalty (Commissioner v. Acker, supra), it has long been settled that Congress may provide civil proceedings for the collection of penalties which are civil or remedial sanctions rather than punitive, and provide that the determination of the facts upon which the liability for such a penalty is based may be by executive officers or administrative agencies. Helvering v. Mitchell, 303 U.S. 391 (1938); Oceanic Nav. Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. U.S., 213 U.S. 103

(1909); Passavant v. U.S., 148 U.S. 214 (1893). The court in Helvering v. Mitchell held that the double jeopardy clause had no application in a proceeding to assert an additional tax of 50% of a deficiency due to fraud imposed by §293(b) of the Revenue Act of 1928 since such a proceeding was a civil one. The court stated: "The remedial character of sanctions imposing additions to a tax has been made clear by this court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." (At p. 401) The additions to the tax imposed by §294(d)(1)(A) are equally remedial in character. Congress has, therefore, properly provided civil proceedings in which assessment of such additions may be tested. The Sixth Amendment has no application to such proceedings. See Walker v. U.S., 240 F.2d 601 (5th Cir. 1957).

Petitioner asserts in the alternative that he is entitled to a jury trial by reason of the Seventh Amendment to the Constitution which guarantees a jury trial where required at common law. He contends that what we have here is an action of common law debt for which a jury trial was required. If this were true, all action for the collection of taxes would be actions of debt, as would all other statutory proceedings involving a sum of money. Such a broad view of the common law action of debt is not tenable. Petitioner cites U.S. v. Regan, 232 U.S. 37 (1914) and

Hepner v. U.S., supra, in support of his contention. The Supreme Court in both of those cases was applying a statute which provided that the penalty imposed therein ". . . may be sued for and recovered by the United States . . . as debts of like amount are recovered in the courts of the United States . . ." Alien Immigration Act, §5, 34 Stat. 898, 900. This is an express requirement that an action to recover the penalty be prosecuted as a common law action of debt. The dicta in these cases, therefore, do not stand for the broad proposition, urged by petitioner, that statutory penalties are always recovered in common law actions of debt. We have under consideration in the instant case a proceeding provided for by statute to test the validity of a penalty assessed pursuant to that statute. No such action existed at common law, and, therefore, no jury trial is required by the Seventh Amendment.

Petitioner asserts that a further constitutional issue arises if we construe the statute as giving the Tax Court jurisdiction to determine the propriety of additions to the tax assessed pursuant to §294. He argues that when a case comes into the Tax Court, Rule 32 of that court places an unconstitutional burden on taxpayers by requiring them to prove that their failure to file was due to reasonable cause rather than willful neglect. The answer is that it is not Rule 32 of the Tax Court which places the burden on the taxpayer, but §294 itself (see footnote 1 supra). The burden of proof, therefore, would be the same in the district court or the court of claims. Where one fact

(willful neglect) is a logical conclusion from another (failure to file), there is no constitutional infirmity in presuming the second fact from the first, thus putting the burden of proof on the protestant. See Boynton v. Pedrick, 228 F.2d 745 (2d Cir. 1955), cert. den., 351 U.S. 938, rehearing den., 351 U.S. 990; and see also Helvering v. Taylor, 293 U.S. 507, 515 (1935). An almost impossible burden would be placed on the government if it had to prove willful neglect by evidence in addition to a taxpayer's failure to file, whereas the taxpayer can easily explain his failure if good cause therefor existed. The allocation of the burden of proof made by §294 is, therefore, founded in good common sense and fairplay.

In any event, petitioner argues, there was no evidence of willful neglect to support such a finding. Since the burden was on the taxpayer to explain his failure to the satisfaction of the Commissioner, a lack of evidence of willful neglect would not negate such a finding. But, be that as it may, a review of the record convinces us that it contains ample evidence to support such a finding, such as spaces on the form 1040 for estimated tax and the fact that petitioner had filed in prior years.

We have the further contention that the government is barred from prosecuting its claim because of laches. This contention is answered by the case of U.S. v. Summerlin, 310 U.S. 414, 416 (1940) which holds that laches is no defense against the United States. Petitioner attempts to distinguish the Summerlin case on the ground that "there the defense of laches did not also raise a constitutional issue." This

attempt to thus distinguish Summerlin has no validity because there is no deprivation of constitutional rights in the instant case. The claim of laches made here is based on the ground that the government destroyed forms and accompanying instruction booklets for years preceding 1950; that such pamphlets if available would have shown that there was no express instruction in them with regard to the filing of declarations of estimated tax as has been contained in such pamphlets since 1950; and that he was, therefore, justified in believing that he was not required to file declarations in 1952 and 1953. If it be granted that the production of these pamphlets would show what is claimed for them, the absence of express instructions on the point would not excuse ignorance of the unambiguous requirement contained in §58 of the Internal Revenue Code of 1939.

We see no merit in petitioner's contention that he should be excused from the payment of the additional tax because had demands for the statutory penalty been made earlier he would have been required to pay less. No such shift in responsibility can be sanctioned. Petitioner could have avoided all liability by complying with a statutory requirement which he should have known existed.

The case is remanded to the Tax Court with instructions that it strike from its judgment all penalties added under §294(d)(2), and, as thus amended, the judgment of the Tax Court is affirmed.

(Endorsed:) Opinion. Filed Dec. 10, 1959.
Paul P. O'Brien, Clerk.

## Appendix "C"

United States Court of Appeals
for the Ninth Circuit

| | |
|---|---|
| GEORGE OLSHAUSEN, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.* | No. 16,183 |

### JUDGMENT

Petition to Review a Decision of the Tax Court of the United States.

This cause came on to be heard on the Transcript of the Record from the Tax Court of the United States, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that this cause be, and hereby is remanded to the said Tax Court with instructions that it strike from its decision all penalties added under Section 294(d)(2), and as thus amended, the Decision of the said Tax Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered: December 10, 1959
Paul P. O'Brien, Clerk

## Appendix "D"

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday,
January 19, 1960

Before: HEALY, ORR and HAMLIN, Circuit Judges

### ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Petitioner, filed December 30, 1959, and within time allowed therefor by Rule of Court for a rehearing of the above cause, be, and hereby is denied.

## Appendix "E"

### CONSTITUTIONAL AND STATUTORY PROVISIONS

### Constitution

### ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

## ARTICLE VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

## DEFINITION OF DEFICIENCY

1939 Code Sec. 271.

(a) In general. As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

## PROCEDURE IN GENERAL

1939 Code Sec. 272.

(a)(1) Petition to The Tax Court of the United States. If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail.

## ADDITIONS TO THE TAX IN CASE OF NONPAYMENT

1939 Code Sec. 294(d) Estimated tax

(1) Failure to file declaration or pay installment of estimated tax

(A) Failure to file declaration. In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid.

## TAX COURT RULE 32

Burden of Proof. The burden of proof shall be upon the petitioner, except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent.

## Appendix "F"

(h) The Commissioner of Internal Revenue erred in issuing a deficiency notice at all, and erred in holding that the present case falls within the deficiency notice procedure;

(i) The Commissioner of Internal Revenue erred in failing to hold that a deficiency notice in the present case violates petitioner's constitutional rights in each of the following respects:

First: It denies the right of trial by jury in violation of the VIth Amendment to the United States Constitution, where the amounts claimed are criminal penalties, and in violation of the VIIth Amendment to the United States Constitution where the amounts claimed are civil penalties or interest;

FILE COPY

Office-Supreme Court,
FILED
APR 8 1960
JAMES R. BROWNING,

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1959

**No. 744**

GEORGE OLSHAUSEN,
*Petitioner,*
vs.
COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
*Petitioner.*

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1959

No. 744

GEORGE OLSHAUSEN, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

## SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

### I. RIGHT TO FILE SUPPLEMENT.

Petitioner is entitled to file this Supplement to the Petition for Certiorari, since the time is still within the original 90 days from the denial of rehearing by the Court of Appeals (Jan. 19, 1960).

II. EFFECT OF FLORA v. U. S. (MAR. 21, 1960), 28 L.W. 4196.

Petitioner files this Supplement to comment on the second opinion in *Flora v. U. S.* (March 21, 1960), 28 L.W. 4196.

A. The latest decision in *Flora v. U. S.*, 28 L.W. 4196, strengthens petitioner's position that if the Seventh Amendment applies to a civil penalty at all, the guaranty of a jury can be met only by holding the deficiency notice procedure inapplicable to enforcement of penalties such as that under 1939 Code sec. 294(d)(1)(A). (Cf. Petition for Certiorari, pp. 6, 11-13).

Under *Flora v. U. S.*, 28 L.W. 4196, the jury trial under 28 U.S.C. 1345(a)(1) is available only *after* payment *in full* of the disputed demand. But the right to a jury under the Seventh Amendment is the right "of trial by jury, as fixed by the common law". *(Root v. L.S. & W.R.S. Co.*, 105 U.S. 189, 206, Pet'n Cert. p. 12.)

So far as we have found, the common law never permitted the right to a jury trial in a civil case to be made conditional on the *prepayment in full* of a demand disputed both as to amount and liability. Sec. 28 U.S.C. 1345(a)(1) is not a means of satisfying the guarantee of a common law jury; if this guarantee applies to a civil penalty (as we believe it does) the guarantee can be satisfied only by holding the deficiency-notice procedure inapplicable to penalties.

B. In our Petition for Certiorari (pp. 9, 13) we pointed out that a conditional jury could be allowed in *tax* cases, because litigation over *taxes* was not covered by the Seventh Amendment. That is, the

legality of a tax was not something which was justiciable at common law before the time of the American Revolution. (*Wickwire v. Reinecke*, 275 U. S. 101, 105-6.)

*Flora v. U. S.*, 28 L.W. 4196, 4198, remarks:

> "'Moreover, we are not satisfied that the suit against the Collector was identical to the common-law action of assumpsit for money had and received. One difficulty is that, because of the Act of February 26, 1845, C. 22, 5 Stat. 727, which restored the right of action against the Collector after this Court had held that it had been implicitly eliminated by other legislation, the court no longer regarded the suit as a common-law action, but rather as a statutory remedy which 'in its nature [was] a remedy against the Government'. *Curtis's Administratrix v. Fiedler*, 2 Black, 461, 479."

This clearly does not apply to a proceeding in which *the Government moves to enforce* a civil penalty.

C. The excerpts from congressional debates on the Board of Tax Appeals, which *Flora v. U. S.* quotes at 28 L.W. 4200-4201, refer entirely to *taxes*. The language of the debates indicates that there was not even any intention to change the procedure under which *penalties* were enforced in an action brought by the Government and tried before a jury, as in *Felton v. U. S.*, 96 U. S. 699.

Dated, San Francisco, California,
March 30, 1960.

Respectfully submitted,
GEORGE OLSHAUSEN,
*Petitioner.*

ILE COPY

FILED
MAY 27 1960

No. 748

# In the Supreme Court of the United States

October Term, 1959

GEORGE OPPENHEIM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
I. HENRY KUTZ,
SAM O'ROURKE,
Attorneys,
Department of Justice, Washington 25, D.C.

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# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 744

GEORGE OLSHAUSEN, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (Pet. i–vii; R. 52–59) are not officially reported. The opinion of the Court of Appeals (Pet. ix–xvii) is reported at 273 F. 2d 23.

### JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1959. (Pet. xviii.) The taxpayer's petition for rehearing was denied on January 19, 1960. (Pet. xix.) The petition for a writ of certiorari was filed on February 29, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the deficiency notice procedure established by the Internal Revenue Code may be used in enforcing the additions to tax prescribed by Section 294(d)(1)(A) of the 1939 Code.

2. Whether the Tax Court remedy invoked by petitioner is constitutionally objectionable because it does not offer a jury trial.

3. Whether the Tax Court proceeding violates due process in that it places the burden upon the taxpayer to show reasonable cause for his failure to file a declaration of estimated tax.

4. Whether the courts below erred in holding that the taxpayer failed to show that his failure to file declarations of estimated tax was due to reasonable cause.

## STATUTES INVOLVED

The pertinent provisions of Sections 58, 271(a), 272(a)(1) and 294(d)(1)(A) of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 8–12.

## STATEMENT

The relevant facts are undisputed and may be briefly summarized as follows:

The taxpayer is an attorney who did not file declarations of estimated tax for 1952 and 1953. (Pet. ii; R. 53.) The Commissioner issued a deficiency notice in which he made the following explanation (Pet. iii; R. 54):

> You did not file Declarations of Estimated tax nor make timely payments of estimated tax for the taxable years 1952 and 1953. No rea-

sonable cause having been shown, you are liable for the additions to the tax provided by section 294(d)(1)(A) and section 294(d)(2), Internal Revenue Code (1939) for the taxable years 1952 and 1953.

The taxpayer filed a petition for redetermination with the Tax Court (R. 3–9) but subsequently filed an amendment to his petition in which he contended that the Commissioner erred in issuing a deficiency notice to him (R. 14–15). The Tax Court held (Pet. iii–vii; R. 54–58) that it had jurisdiction to adjudicate the case; that the taxpayer's failure to file declarations of estimated tax for 1952 and 1953 was not due to reasonable cause; and that the taxpayer was liable for additions to the tax for both years under Section 294(d)(1)(A). The Tax Court also held (Pet. vii; R. 58–59) that the taxpayer was liable for the additions under Section 294(d)(2) of the 1939 Code for substantial underestimation of taxes. The Court of Appeals (Pet. ix–xvii) affirmed the Tax Court with respect to the imposition of the additions for failure to file declarations but, on the authority of this Court's decision in *Commissioner* v. *Acker*, 361 U.S. 87, reversed the Tax Court with respect to the imposition of the additions for substantial underestimation.

## ARGUMENT

The decision below is correct, there is no conflict of authority, and there is no occasion for review by this Court.

1. The taxpayer contends (Pet. 14–17) that the deficiency procedures, set forth in Section 272 of the

Internal Revenue Code of 1939 (Appendix, *infra*, pp. 10–11), may not be utilized to enforce additions to tax under Section 294(d)(1)(A) (Appendix, *infra*, pp. 11–12) for failure to file a declaration of estimated tax where there is no deficiency in the tax apart from the additions. Yet the taxpayer himself invoked the jurisdiction of the Tax Court. The decision below, holding that the Tax Court had jurisdiction, conforms to other decisions under the 1939 Code involving only additions to the tax. *Newsom* v. *Commissioner*, 219 F. 2d 444 (C.A. 5th), affirming, *per curiam*, 22 T.C. 225; *Davis* v. *Dudley*, 124 F. Supp. 426 (W.D. Pa.); *Meyers* v. *Commissioner*, 28 T.C. 12; *Marbut* v. *Commissioner*, 28 T.C. 687; see *Granquist* v. *Hackleman*, 264 F. 2d 9, 13–14 (C.A. 9th); cf. *United States* v. *Erie Forge Co.*, 191 F. 2d 627 (C.A. 3d), certiorari denied, 343 U.S. 930. The same view has been followed in analogous cases arising under the 1954 Code. See *Granquist* v. *Hackleman*, *supra*; *Enochs* v. *Muse*, 270 F. 2d 528 (C.A. 5th); *Strawberry Hill Press, Inc.* v. *Scanlon*, 273 F. 2d 306 (C.A. 2d).[1]

2. The taxpayer contends (Pet. 6–14) that the Tax Court proceedings were unconstitutional in that they deprived him of a right to a jury trial in violation of

[1] The addition for failure to file a declaration was omitted from the 1954 Code. The procedures to be followed with respect to certain other additions has received recent legislative consideration. See Act of May 14, 1960, P.L. 86–470, 74 Stat. 132, amending Section 6659(b) of the 1954 Code (26 U.S.C. 6659(b)), so as to do away with the required deficiency procedures in the case of certain additions. See, also, H. Rep. No. 1217, 86th Cong., 2d Sess.; S. Rep. No. 1098, 86th Cong., 2d Sess.

the Sixth and Seventh Amendments. It has long been settled that Section 294(d)(1)(A) imposes a civil sanction and that the Sixth Amendment accordingly does not apply. See *Helvering* v. *Mitchell*, 303 U.S. 391; *Spies* v. *United States*, 317 U.S. 492, 495; *Walker* v. *United States*, 240 F. 2d 601 (C.A. 5th), certiorari denied, 354 U.S. 939. Nor is there any basis for the taxpayer's contention that the collection of a civil penalty under the taxing statute must be prosecuted as a common law action of debt (to which the Seventh Amendment would be applicable). Tax Court remedies are statutory. *Wickwire* v. *Reinecke*, 275 U.S. 101, 105–106; *Helvering* v. *Mitchell*, *supra*; *Walker* v. *United States*, *supra*; *Harvey* v. *Early*, 160 F. 2d 836 (C.A. 4th).[2] And, as the Court of Appeals pointed out (Pet. xiii), the taxpayer invoked those remedies. If he desired a jury trial, he could have paid the amount assessed and sued for refund in the district court. There is no merit to the contention (Pet. 12–13) that conditioning the right to jury trial upon prepayment violates the Seventh Amendment. See *Flora* v. *United States*, 362 U.S. 145; *Helvering* v. *Mitchell*, *supra*; *Walker* v. *United States*, *supra*; *Harvey* v. *Early*, *supra*.[3]

---

[2] The cases relied upon by the taxpayer, such as *Leimer* v. *Woods*, 196 F. 2d 828 (C.A. 8th); *United States* v. *Regan*, 232 U.S. 37; and *Hepner* v. *United States*, 213 U.S. 103, are not in point. They involved statutes which provided that penalties were to be prosecuted in the manner of a common law action of debt.

[3] The taxpayer errs in contending (Pet. 13) that taxes, historically, have been collected by administrative action, whereas penalties have been enforced by jury trial. For example, the taxpayer does not deny that where the jurisdiction of the Tax

3. Since the inference of willful neglect follows logically from the fact of an unexplained failure to file a declaration, there is plainly no deprivation of due process in imposing the burden of proof upon the taxpayer to show that there was reasonable cause for his dereliction. See *Boynton* v. *Pedrick*, 228 F. 2d 745 (C.A. 2d), certiorari denied, 351 U.S. 938.

4. Finally, there is no merit to the taxpayer's contention (Pet. 23–24) that civil sanctions may not be imposed on the basis of facts determined by an administrative agency. *Helvering* v. *Mitchell*, *supra*, p. 402; *Walker* v. *United States*, *supra*, pp. 603–604; *Spies* v. *United States*, *supra*, p. 495. Moreover, the taxpayer completely overlooks the fact that the Commissioner's determination that additions were owing is not conclusive, but is subject to a full judicial review before an independent tribunal. Here, the taxpayer availed himself of the opportunity for such review. Both courts below, having considered the facts of record, determined the disputed issue against him.

---

Court attaches because there is a deficiency in the tax, that court also has jurisdiction to determine the amount of the penalty. See, *e.g.*, *Commissioner* v. *Lane-Wells Co.*, 321 U. S. 219.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*

CHARLES K. RICE,
*Assistant Attorney General.*

I. HENRY KUTZ,
KARL SCHMEIDLER,
*Attorneys.*

MAY 1960.

# APPENDIX

Internal Revenue Code of 1939:

SEC. 58 [As amended by Sec. 13(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, Sec. 202(a), Revenue Act of 1948, c. 168, 62 Stat. 110; and Sec. 221(g), Revenue Act of 1950, c. 994, 64 Stat. 906]. DECLARATION OF ESTIMATED TAX BY INDIVIDUALS.

(a) *Requirement of Declaration.*—Every individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621(a), withholding under Subchapter D of Chapter 9 is not made applicable but including every alien individual who is a resident of Puerto Rico during the entire taxable year) shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of $4,500 plus $600 with respect to each exemption provided in section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed $100 for the taxable year and his gross income to be $600 or more.

* * * * *

(d) *Time and Place for Filing.*—

(1) *In general.*—The declaration required under subsection (a) shall be filed on or before March 15 of the taxable year, except that if the requirements of section 58(a) are first met

(A) after March 1 and before June 2 of the taxable year, the declaration shall be filed on or before June 15 of the taxable year, or

(B) after June 1 and before September 2 of the taxable year, the declaration shall be filed on or before September 15 of the taxable year, or

(C) after September 1 of the taxable year, the declaration shall be filed on or before January 15 of the succeeding taxable year.

* * * * *

(3) *Return as declaration or amendment.*—If on or before January 15 of the succeeding taxable year the taxpayer files a return, for the taxable year for which the declaration is required, and pays in full the amount computed on the return as payable, then, under regulations prescribed by the Commissioner with the approval of the Secretary—

(A) If the declaration is not required to be filed during the taxable year, but is required to be filed on or before such January 15, such return shall, for the purposes of this chapter, be considered as such declaration; and

(B) If the tax shown on the return (reduced by the credits under sections 32 and 35) is greater than the estimated tax shown in a declaration previously made, or in the last amendment thereof, such return shall, for the purposes of this chapter, be considered as the amendment of the decla-

ration permitted by paragraph (2) to be filed on or before such January 15.

• • • • •

(26 U.S.C. 1952 ed., Sec. 58.)

SEC. 271 [As amended by Sec. 14(a), Individual Income Tax Act of 1944, *supra*]. DEFINITION OF DEFICIENCY.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

• • • • •

(26 U.S.C. 1952 ed., Sec. 271.)

SEC. 272 [As amended by Sec. 203(a), Act of December 29, 1945, c. 652, 59 Stat. 669]. PROCEDURE IN GENERAL.

(a)(1) *Petition to The Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its col-

lection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 294. [As amended by Sec. 118(a), Revenue Act of 1943, c. 68, 58 Stat. 21; and Sec. 13(b) of the Individual Income Tax Act of 1944, *supra*]. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * * *

(d) *Estimated Tax.*—

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount

thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credit under sections 32 and 35.

* * * * *

(26 U.S.C. 1952 ed., Sec. 294.)

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1959

**No. 744**

GEORGE OLSHAUSEN, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

## PETITIONER'S PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI.

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
*Petitioner.*

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This petition for rehearing is filed instead of petitioner's reply to brief for respondent in opposition (Under Rule 24(4)) which having been inadvertently sent ordinary mail rather than airmail by the printer, arrived in Washington after the petition for certiorari had been denied. It is confined to matter in answer to respondent's brief in opposition, covering only matters not originally raised. (Rule 58(2).)

Respondent's brief in opposition makes two arguments, of which the central points are summed up in the following passages:

> 1. (Resp. Br. Opp. pp. 3-4.) "The taxpayer contends . . . that the deficiency procedures, set forth in Section 272 of the Internal Revenue Code of 1939 . . . may not be utilized to enforce additions to tax under Section 294(d)(1)(A) . . . for failure to file a declaration of estimated tax where there is no deficiency in the tax apart from the additions. *Yet the taxpayer himself invoked the jurisdiction of the Tax Court.* The decision below, holding that the *Tax Court had jurisdiction,* conforms to other decisions under the 1939 Code involving only additions to the tax". (Italics added.)

2. In footnote 3, on pages 5 and 6 of the brief in opposition respondent cites *Commissioner v. Lane-Wells,* 321 U.S. 219 (which, as shown below, did not discuss the point).

We consider these two points in order.

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**1. ISSUE IS AS TO SUBSTANTIVE RELATION OF STATUTES (1939 CODE SECS. 271, 272, 294(d)(1)(A))—NOT JURISDICTION OF TAX COURT.**

**a. No issue in the present case as to the jurisdiction of the Tax Court to review the question—only issue as to substantive matters.**

The issue is not whether the Tax Court had jurisdiction but as to the substantive disposition which the Tax Court should have made under the statutes.

What the Tax Court was asked to do by this proceeding is the equivalent of sustaining a general demurrer to a complaint. Since 1939 Code Secs. 271 and 272 say the deficiency notice procedure may be used for a deficiency in the *tax*, and since *C.I.R. v. Acker*, 361 U.S. 87 holds the "addition" under 1939 Code Sec. 294(d)(1)(A) to be a *penalty* (and *not* a tax) a deficiency notice which sets forth only the penalty under Sec. 294(d)(1)(A) does not state facts which may be enforced by a deficiency notice under 1939 Code Secs. 271 and 272. (Quoted Petn. App'x. pp. xxi-xxii; Resp. Br. in Opp. 10-11.)

The argument that the Tax Court had jurisdiction is therefore wholly beside the point. The question is—what is the scope of 1939 Code Secs. 271 and 272 (defining deficiency) in view of this court's holding in *C.I.R. v. Acker*, 361 U.S. 87, that the addition in Sec. 294(d)(1)(A) is a *penalty*. None of the cases cited on page 4 of respondent's brief in opposition mentions the *Acker* case; most were decided before it.

**b. Likewise the argument—"Yet the taxpayer himself invoked the jurisdiction of the Tax Court—" (Resp. Br. Opp. p. 4) does not remove the problem of statutory construction.**

If it should be conceded for purposes of argument, that petitioner, having gone into the Tax Court, lost the right to a jury trial *in this case*, the problem whether a jury trial is at all available or is being denied under all circumstances in the enforcement of a civil penalty—is still a consideration in the construction of the statute. And once it has been determined that the addition provided in Sec. 294(d)(1)(A) is a

penalty, (*C.I.R. v. Acker,* 361 U.S. 87), the construction adopted by the Court of Appeals not only presents this constitutional question, but goes squarely against the language of the statute. (1939 Code Secs. 271 and 272—deficiency notice where there is deficiency in *tax.*) A contrary construction would accord with the language of the statute, and raise no constitutional issues in any setting.

2. In footnote 3 (Resp. Br. in Opp. pp. 5-6) respondent cites *Commissioner v. Lane-Wells Co.,* 321 U.S. 219, for the assertion that "the taxpayer does not deny that where the jurisdiction of the Tax Court attaches because there is a deficiency in the tax, that court also has jurisdiction to determine the amount of the penalty."

We made no concession on this score.

In *Com'r v. Lane-Wells,* 321 U.S. 219, 224-5, the applicability of deficiency notice procedure to a penalty was not raised. All parties apparently were content to have the Commissioner and the Tax Court decide the question of *reasonable cause versus wilful neglect.*

It is true that any statute which *expressly* provides for an administrative penalty to be reviewed only by the Tax Court would *necessarily* raise constitutional questions which do *not necessarily* arise in the case at bar. Further than that petitioner has made no concession.

3. This case involves the construction of 1939 Int. Rev. Code Sees. 271, 272 and 294d(1)(A) in the light

of this court's decision in *C.I.R. v. Acker*, 361 U.S. 87. This question is neither met nor laid at rest by pointing out (as respondent does) that the Tax Court had jurisdiction to decide the question, nor by arguing that petitioner should have followed different procedure to obtain a jury. *It should be noted that respondent does not suggest that the problem lacks importance.*

A rehearing should be granted and the writ of certiorari should issue.

Dated, San Francisco, California,
June 22, 1960.

Respectfully submitted,
GEORGE OLSHAUSEN,
*Petitioner.*

## Certificate.

I hereby certify that the above petition is filed in good faith and not for delay and that it is confined to matters not contained in the original petition, i.e., to matters in reply to Respondent's Brief in Opposition.

Dated, San Francisco, California,
June 22, 1960.

George Olshausen.